UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANTONIO LEON, Petitioner, -v- DENNIS BRESLIN, Superintendent, Arthur Kill Correctional Facility, Respondent.	04 Civ. 7972 (DLC) MEMORANDUM OPINION AND ORDER

Appearances:

For Petitioner:
Antonio Leon
Pro Se

For Respondent:
Luke Martland
Federal Habeas Corpus Section
Office of the Attorney General
120 Broadway
New York, New York 10271

DENISE COTE, District Judge:

Pro se petitioner Antonio Leon ("Leon") seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his March 2, 2001 conviction for criminal sale of a controlled substance in the third degree following a jury trial. Leon asserts that he was denied effective assistance of counsel after two judges refused to appoint new counsel, and that the trial court erred when it permitted a read-back of more testimony than requested by the jury.

The case was referred to Magistrate Judge Henry Pitman for a Report and Recommendation ("Report"), which was issued May 3, 2006. The Report recommends that the petition be denied. Leon,

who is no longer in custody, did not file an objection to the Report. This Opinion adopts the Report.

Background

The facts established at trial are set forth in the Report and summarized here. On May 14, 2000, an undercover police officer approached Pery Wiley ("Wiley") and attempted to purchase cocaine. Wiley took him several blocks away, where Wiley asked petitioner for drugs. The petitioner took money from Wiley and the officer, went around a corner and returned shortly with two packets of cocaine and change from the money they had given him. The undercover officer subsequently radioed a description of Wiley and Leon to waiting team members, who arrested both Wiley and Leon.

Procedural History

On February 2, 2001, a jury found Leon guilty of one count of criminal sale of a controlled substance in the third degree. Petitioner was sentenced on March 2, 2001 to an indeterminate term of imprisonment of five to ten years as a second felony offender. The jury was unable to reach a verdict on the charge of criminal sale of a controlled substance in or near school grounds.

Petitioner appealed to the Appellate Division, raising the same issues presented in this appeal. The Appellate Division found that the trial court correctly denied Leon's motion for substitution of assigned counsel because he had not shown good cause for the substitution. It noted that Leon did not raise the

issue of counsel's effectiveness at trial. As for Leon's contention that more material was read back to the jury than it had requested, the court found that there was no prejudice. The petitioner's application for leave to appeal to the New York Court of Appeals was denied April 19, 2004. Petitioner submitted the current petition to the Eastern District of New York on August 20, 2004, and it was transferred to the Southern District of New York on August 30, 2004. The petition was referred to Magistrate Judge Pitman on November 8, 2004.

Discussion

The reviewing court "may accept, reject, or modify, in whole or in part, the findings and recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(c). "To accept the report and recommendation of a magistrate, to which no timely objection has been made, a district could need only satisfy itself that there is no clear error on the face of the record." Wilds v. United Parcel Serv., 262 F. Supp. 2d 163, 169 (S.D.N.Y. 2003) (citing Nelson v. Smith, 618 F. Supp. 1186, 1189 (S.D.N.Y. 1985)). For the reasons described in the Report, the petitioner has not shown that the Appellate Division's decision to reject Leon's claim was either contrary to or an unreasonable application of clearly established federal law. See 28 U.S.C. § 2254(d).

Conclusion

The recommendation of Magistrate Judge Henry Pitman is adopted and the petition for a writ of habeas corpus is denied.

In addition, I decline to issue a certificate of appealability. The petitioner has not made a substantial showing of a denial of a federal right, and appellate review is therefore not warranted. Tankleff v. Senkowski, 135 F.3d 235, 241 (2d Cir. 1998). I also find pursuant to Title 28, United States Code, Section 1915(a)(3), that any appeal from this order would not be taken in good faith. Coppedge v. United States, 369 U.S. 438, 445 (1962). Moreover, Leon made no objections to the Report, and as the Report advised him, he has waived his right to appeal. DeLeon v. Strack, 234 F.3d 84, 86 (2d Cir. 2000). The Clerk of Court shall dismiss this petition.

SO ORDERED:

Dated: New York, New York
August 9, 2006

DENISE COTE
United States District Judge